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No. 85-1376

In the

SUPREME COURT OF THE UNITED STATES

October Term 1985

GLASGOW, INC.,

Petitioner,

v.

STEPHEN S. NOETZEL and
MARILYN B. NOETZEL, his wife,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether or not the judgment rendered in West Virginia was in violation of federal due process rights?

2. Whether or not the question of a possible violation of federal due process rights was decided by other courts in a manner to preclude examination by Pennsylvania courts based upon principles of res judicata?

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COUNTER-STATEMENT OF JUDGMENT BELOW

In addition to opinions

noted by petitioner, respondent would call the Court's attention to the judgment rendered by the United States District Court for the Southern District of West Virginia: Glasgow, Inc. v. Noetzel, 556 F. Supp. 595 (1983); the judgment of the Circuit Court of Kanawha County, West Virginia, which is unreported but reproduced as Appendix A at pages A1 - A8; and the action of the West Virginia Supreme Court of Appeals which is unreported but reproduced as Appendix B at pages A9 - A10.

COUNTER-STATEMENT OF CONSTITUTIONAL, STATUTORY OR REGULATORY PROVISIONS INVOLVED

In addition to the constitutional provision noted by petitioner there is involved the provision of United States Constitution Article 4, Section

1, which provides: "Full faith and credit shall be given in each state to the . . . judicial proceedings of every other state." Also involved is the constitutionality of West Virginia Rules of Civil Procedure Rule 5(a) (See Appendix C pp. A11 - A12) and Rule 60(b) (See Appendix D pp. A13 - A 15). Indirectly, the constitutionality of Rule 5 of the Federal Rules of Civil Procedure, identical to the West Virginia rule, is questioned.

COUNTER-STATEMENT OF THE CASE

On June 11, 1979, a tort action was instituted by Stephen S. Noetzel and Marilyn B. Notzel, his wife, (respondents, hereinafter "Noetzels") against Glasgow, Inc. (petitioner,

hereinafter "Glasgow") in the Circuit Court of Kanawha County, West Virginia. On June 18, 1979, a summons and complaint was served on the Secretary of State of West Virginia as statutory attorney-in-fact for Glasgow. On the same day this process was sent to and actually received by an agent designated by Glasgow for such purpose. In a timely fashion Glasgow's designated agent sent the process of the Circuit Court of Kanawha County to another agent of Glasgow, its counsel, which process was actually received. Included in the process of the Circuit Court of Kanawha County, actually received by Glasgow through its agents, was a statement that Glasgow had a specified period of time within which to answer and defend or that judgment

by default would be entered against Glasgow. Glasgow did not enter an appearance, answer or defend and judgment pursuant to a jury trial was rendered against it by the Circuit Court of Kanawha County on June 25, 1980. Pursuant to Rule 5 (a) of the West Virginia Rules of Civil Procedure, identical in pertinent language to Rule 5 of the Federal Rules of Civil Procedure, the only notice that was given to Glasgow of various events in the judgment procedure was the original notice actually received by Glasgow. Glasgow's assertion in its statement of the Case that it did not receive actual notice is false.

After commencement of collection activities by Noetzels more than eight months after entry of judgment, Glasgow

moved in the original action to set aside the judgment upon grounds under Rule 60(b) of the West Virginia Rules of Civil Procedure. No federal due process question was raised. The Circuit Court of Kanawha County ruled, among other things, that Glasgow had actually received proper notice of the proceedings; that no factual or legal basis existed for relief from the judgment; and that, in any event, allegations of mistake, inadvertance, surprise or fraud had not been timely made under provisions of Rule 60(b) of the West Virginia Rules of Civil Procedure which requires such to be asserted within eight months (Appendix D, pp. A13 - A15). This judgment was never appealed and the time within which to appeal has expired.

At about the same time Glasgow petitioned the Supreme Court of Appeals of West Virginia for a writ of prohibition setting aside the judgment and prohibiting collection activities. The West Virginia Supreme Court declined to award the writ (Appendix B, pp. A9 - A10). This decision was not appealed nor was there taken a petition for a writ of certiorari to this Court. The time within which to do so has expired.

Also at about the same time, and more importantly, Glasgow filed an action in the United States District Court for the Southern District of West Virginia, asserting, among other things, that it had been deprived of federal due process rights. The United States District Court ruled that, among other things, proper original process had been actually

received; that Glasgow was not entitled to additional notice; that federal due process had been satisifed; and that the state court action on the Rule 60(b) motion was res judicata in any event. This judgment was not appealed and the time within which to do so has expired.

Noetzels collected a portion of their judgment in West Virginia and then sought to collect the balance in Pennsylvania under the Full Faith and Credit clause of the United States Constitution. Glasgow resisted these activities and sought to litigate the merits of the underlying cause as well as again raising federal due process contentions. The Superior Court of Pennsylvania, affirmed by refusal to review by the Supreme Court of Pennsylvania, held that Glasgow had been afforded federal due process and that, in

any event, principles of res judicata based on the United States District Court's decision as well as decisions rendered by state courts in West Virginia precluded review of these already decided issues. It is to this decision that the petition for writ of certiorari is taken.

Petitioner's Statement of the Case contains many assertions concerning the underlying West Virginia's judgement which are totally unsupported by the record or any decision below and with which respondents disagree. Those factual matters, however, are not properly in issue in this proceeding.

SUMMARY OF REASONS WHY WRIT SHOULD NOT BE GRANTED

Respondents argue that the original

judgment obtained in West Virginia was based on due process satisfying notice and is entitled to full, faith and credit in Pennsylvania.

Respondents further argue that there exists no due process deficiency in the applicable West Virginia Rules of Civil Procedure.

Respondents further argue that all of the issues advanced by petitioner have already been litigated to a finality in state and federal courts in West Virginia and are not subject to review by the Pennsylvania courts or this Court because of principles of res judicata.

REASONS WHY WRIT SHOULD NOT BE GRANTED

The fundamental question addressed by the Pennsylvania Courts was whether or

not the West Virginia judgment obtained by the Noetzels against Glasgow was entitled to full faith and credit in Pennsylvania under Article 4, Section 1 of the United States Constitution.

Glasgow argues that full faith and credit should not be afforded because of some deprivation of due process in West Virginia. No contention has ever been made that the West Virginia court lacked jurisdiction of the subject matter of the litigation. Glasgow apparently claims that it was deprived of due process by virtue of receiving inadequate notice of the West Virginia proceeding. Despite the assertion by Glasgow that it did not recieve actual notice, it admits that original process was actually received by the West Virginia Secretary of

State, its statutory agent, and by an individual appointed by Glasgow to receive such process from the Secretary of State who, in turn, sent it to Glasgow's attorney who actually received it. Glasgow does not explain how actual receipt by its agents appointed for that purpose does not constitute actual receipt by the corporation. The very nature of corporations dictates that actual receipt of anything must be through a human agent.

Glasgow further argues that it was deprived of notice of subsequent events in the West Virginia litigation. However, Rule 5(a) of the West Virginia Rules of Civil Procedure, identical to the federal rule, provides that no notice need be given to parties

in default. (Appendix C, p. All). This does not violate due process because Glasgow received the original process which provided adequate general notice of the proceedings.

Glasgow then asserts that it was deprived of due process by virtue of the provisions of Rule 60(b) of the West Virginia Rules of Civil Procedure which limits the time within which a default judgment can be set aside for grounds such as mistake or inadvertence to eight months from the date of judgment. This time limitation does not apply to void judgments, such as those which may be void for lack of due process. The West Virginia Rules of Civil Procedure are patterned after the federal rules. Prior to the adoption of the Federal Rules of Civil

Rules of Civil Procedure, relief from a judgment could be obtained only during the term of court in which the judgment was entered, which procedure produced unequal time periods depending on when during the term the judgment was entered. The original Rule 60(b) of the Federal Rules of Civil Procedure limited a request for relief from a judgment for grounds such as mistake or inadvertence to six months. 7 Moore's Federal Practice, §60.09. This period was extended to one year by amendment to the federal rules in 1946. Glasgow does not argue that the eight month period is unreasonable because of the length of the period but seems to argue that the existence of any time period is violative of due process. No cogent argument can be made to support such a contention,

particularly in view of the history of such remedial procedures and similar limitations in federal jurisprudence.

Glasgow contends that the Pennsylvania courts erred in concluding that principles of res judicata precluded re-litigation of issues of due process. The West Virginia trial court, in response to a Rule 60(b) motion made by Glasgow, ruled that there was no deficiency in service of original process on Glasgow; that its agent actually received the original process; that by virtue of its failure to appear it was not entitled to further notice; that Glasgow had failed to support its claim of fraud or mistake; and that Glasgow had generally asserted no factual or legal basis for relief. (See Appendix A pp. A2 - A8). This

ruling was never appealed and is now final. Glasgow then sought a writ of prohibition from the Supreme Court of Appeals of West Virginia, which was denied (See Appendix B, pp. A9 - A10). This likewise was never appealed and is final. Finally Glasgow collaterally attacked the judgment in the United States District Court for the Southern District of West Virginia which held that Glasgow raised or could have raised all of the due process questions in the trial court and that principles of res judicata precluded re-litigation of the same issues. Glasgow, Inc. v. Noetzel, 556 F. Supp. 595 (1983). This ruling was not appealed and is now final. Thus not only have these parties already litigated to a finality all of Glasgow's contentions but have already

litigated to a finality the question of the proper application of principles of res judicata.

It is fundamental that issues once litigated to a finality between the same parties cannot again be litigated in a subsequent action. Partman Corp. v. Parmount Pictures Threatres Corp., 347 U.S. 89 (1954). Further this includes not only issues that were raised but issues that could have been raised. In Re: Estate of Nichols, 144 W.Va. 116, 107 SE2d 53 (1959).

Glasgow in its petition has simply not advanced any sensible argument for review by this Court of issues which have already been litigated to a finality and which had no merit in the first place. The Pennsylvania courts have been plainly right. Durfee v.

Duke, 375 U.S. 106 (1963), Kremer v. Chemical Construction Corp., 456 U.S. 461 (1982).

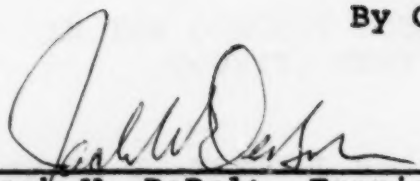
CONCLUSION

Respondents submit that petitoner has failed to state any supportable reason for review by this Court. Neither has petitioner cited any authority to support its claims. Respondents accordingly request that this Court deny the petition. Because petitioner's argument is so clearly without merit as to be frivolous, respondents would also respectfully request this Court to award respondents damages pursuant to Supreme Court Rule 49.2.

Respectfully submitted,

Stephen S. Noetzel and
Marilyn B. Noetzel,

By Counsel



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APPENDIX A

IN THE CIRCUIT COURT OF KANAWHA
COUNTY, WEST VIRGINIA

STEPHEN S. NOETZEL and
MARILYN B. NOETZEL

vs.

GLASGOW, INC., a
corporation

On March 23, 1981 came the plaintiffs by their counsel, Jack W. DeBolt and Timothy N. Barber, and also came the defendant by its counsel, Elmer H. Dodson and Stanley E. Deutsch, pursuant to an oral notice of defendant's motion for preliminary injunction herein and defendant's motion for relief from judgment order given by counsel for defendant to counsel for plaintiffs approximately one

(1) hour before hearing, and as an accommodation to the Court. Whereupon the Court heard the arguments and affirmation of respective counsel on the issues arising in each motion. Upon the pleadings, affidavit, affirmations and arguments the court found the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. The allegations in defendant's motion for preliminary injunction coupled with the affirmations of counsel for defendant thereon as well as the verified motion for relief from judgement order provide no factual basis for the determination that defendants would suffer any irreparable damage or any other basis for the issuance of a preliminary injunction.

2. Defendant admits, and does not deny, that service of the original process in this action was accomplished properly and lawfully by service upon the Secretary of State of West Virginia, and, further that said process was duly, lawfully and properly forwarded to and received by a qualified agent of defendant.

3. Defendant never appeared in this cause of action either specially, generally, formally or informally.

4. The claim and cause of action set forth in the Complaint herein was not changed or altered in any subsequent motions or pleadings herein.

5. Following service of the original process herein no notice of the trial date held herein, any motions, notices for the taking of depositions,

discovery or other motions as well as executions, suggestions and post-judgement ancillary process were served upon defendant.

6. After the verdict of the jury hereinassessing the amounts of damage in favor of the plaintiffs against defendant (June 23, 1980) and the entry of the judgement order reflecting said verdict (June 25, 1980) a period of more than eight (8) months elapsed before either (a) any executions, suggestions, suggestee execution, fieri facias or other ancillary process was issued or returned herein, and/or (b) the filing of defendant's motion for preliminary injunction and/or its motion for relief from judgement order.

7. No specificity was offered by defendant to explain the allegations of

fraud either by plaintiffs or their counsel in the motion for relief from judgement order and, further, no request or motion was made to amend said motion to provide any specificity to said allegations of fraud.

CONCLUSIONS OF LAW

1. None of the pleadings, affidavits, affirmations and arguments of counsel separately or cumulatively provide a basis for issuance of a preliminary injunction as requested by defendant.

2. There was no deficiency in the service of original process upon the defendant.

3. Defendant by its proper agent actually received the original process

herein.

4. By virtue of the failure of defendant to appear herein after service of the original process, it was not entitled to be served with any further notices, pleadings, motions or any other documents attendant or incidental to this cause of action.

5. The allegations of fraud in defendant's motion are not stated with particularity and therefore are improper of [sic] their face and are not subject to consideration. Further no offer of proof, affidavit, argument or affirmations of counsel support any claim of fraud by either plaintiffs or their counsel.

6. The allegations of mistake in defendant's motion are not stated with particularity and therefore are improper

on their face and are not subject to considertion.

7. The allegations in defendant's motion asserting mistake, inadvertance, surprise or fraud were not made within eight (8) months of the entry of the judgement order herein and therefore cannot be considered as grounds to set adide the said judgement order.

8. Defendant has provided no factual or legal basis to substantiate a claim for any relief including that requested in its motion for a preliminary injunction and/or its motion for relief from judgement order.

It is therefore ORDERED that defendant's motion for preliminary injunction and defendant's motion for relief from judgement order are denied,

to all of which defendant objects and excepts. All of which is ordered nunc pro tunc as of March 23, 1981.

ENTER:

/s/ Patrick Casey

Judge

Date: 4/9/81

APPENDIX B

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 2nd day of June, 1981, the following order was made and entered, to-wit:

Glasgow, Inc.

vs. Prohibition

The Honorable Patrick Casey, Judge, etc.

On a former day, to-wit, May 22, 1981, came the petitioner, Glasgow, Inc., by Steptoe & Johnson, Herbert G. Underwood and Irene Keeley, Dodson, Deutsch & Hallanan, Elmer H. Dodson and Stanley E. Deutsch, its attorneys, and presented to the Court its petition and exhibits, praying for a writ of prohibtion to be

directed against The Honorable Patrick Casey, Judge, Circuit Court of Kanawha County, as therein set forth. And came also Jack W. DeBolt, counsel for The Honorable Patrick Casey, Judge, Circuit Court of Kanawha County, and presented memorandum in opposition to granting the writ of prohibition. Upon consideration whereof a majority of the Court is of opinion that a rule should not be awarded and the prayer of the petition is therefore denied. Justice Neely would grant.

A True Copy

Attest: /s/ George W. Singleton
Clerk Supreme Court of
Appeals of West Virginia

APPENDIX C

WEST VIRGINIA RULES OF CIVIL PROCEDURE

RULE 5. Service and filing of pleadings and other papers.

. . .

(a) Service: When required. -- Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar paper shall be served upon each of the parties. No

service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 4.

. . .

APPENDIX D

WEST VIRGINIA RULES OF CIVIL PROCEDURE

Rule 60. Relief from judgment or order.

. . .

(b) Mistakes; inadvertence; excusable neglect; unavoidable cause; newly discovered evidence; fraud, etc. -- On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) Mistake, inadvertence, surprise, excusable neglect, or unavoidable cause; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic),

misrepresentation or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisified, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), (3), and (6) not more than eight months after the judgment order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to

relieve a party from a judgment, order or proceeding, or to grant statutory relief in the same action to a defendant not served with a summons in that action, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, petitions for rehearng, bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.